

**MINUTES**  
**Montana Fish, Wildlife & Parks Commission Meeting**  
**Helena Headquarters**  
**1420 East 6<sup>th</sup> Avenue**  
**Helena, MT 59620**

**MAY 12, 2005**

**Commission Members Present:** Steve Doherty, Chairman; Tim Mulligan, Vice-Chairman; John Brenden; Shane Colton; Victor Workman.

**Fish, Wildlife & Parks Staff Present:** Jeff Hagener, Director; FWP personnel.

**Guests:** See May, 2005 Commission file folder.

**Topics of Discussion:**

- 1. Opening - Pledge of Allegiance**
- 2. Approval of April 14, 2005 Commission Minutes**
- 3. Approval of Commission Expenses through April 30, 2005**
- 4. Recognition Award to Representative Jill Cohenour**
- 5. Ulm Pishkun State Park Acquisition - Eustance Ranch In-holding – Final**
- 6. Brush Lake Acquisition - Informational**
- 7. Exotic Wildlife Classification for Importation / Possession – Final**
- 8. Deep Creek FAS Acquisition – Endorsement**
- 9. Machler Recreational Access & Conservation Easement on Big Spring Creek – Endorsement**
- 10. Harlowton FAS Proposal – Endorsement**
- 11. PPL Montana Public Access Mitigation–Lilienthal Property-Endorsement**
- 12. East Rosebud FAS - Endorsement**
- 13. Commission Decision Whether to Reissue Non-resident Deer Combination Licenses Split from Big Game Combos – Final**
- 14. Beaverhead/Big Hole Rivers Recreation Rules – Final**
- 15. Upland Game Bird Seasons**
- 16. HB454 Hunting Access Agreements – Tentative**
- 17. 2005 Deer, Elk, and Antelope Quotas – Tentative**
- 18. Public Opportunity to Address Issues Not Discussed at this Meeting**

**1. Opening - Pledge of Allegiance.** Chairman Doherty called the meeting to order at 8:00 a.m. and led the Pledge of Allegiance.

**2. Approval of April 14, 2005 Commission Minutes.**

*Action: Workman moved and Mulligan seconded the motion to approve the minutes of the April 14, 2005 meeting. Motion carried.*

**3. Approval of Commission Expenses through April 30, 2005.**

*Action: Colton moved and Workman seconded the motion to approve the Commission expenses through April 30, 2005 as presented. Motion carried.*

**4. Recognition Award to Representative Jill Cohenour.**

Postponed until the June Commission meeting.

**5. Ulm Pishkun State Park Acquisition - Eustance Ranch In-holding – Final. Doug Monger, FWP Parks Division Administrator,** explained that this approximately 3-acre parcel, located on the State Parks side of the county road in Cascade County, has essentially been part of Ulm Pishkun State Park for a number of years. The Commission approved this proposal as a tentative in December. The purchase price of the land was negotiated rather than appraised since the cost of the appraisal would be nearly as much as the appraised value. Only one comment was received, and it was in support of the acquisition.

*Action: Colton moved and Brenden seconded the motion to approve acquisition of the 3.05-acre land parcel at the upper entrance to Ulm Pishkun State Park from the Eustance Ranch at the price of \$10,000. Motion carried.*

Mulligan questioned a letter received by the Commissioners relative to hunting in the Park. Monger was unfamiliar with the specifics of the letter, but stated that the Management Plan has been written and is out for public review. Monger said the Plan proposes that there be no hunting in the Park due to the number of trails in the park, and the close proximity of where people would be hunting and where people would be standing.

Monger stated that the Department owns a 15-acre parcel of land north of the county road that may be beneficial for the new owners of the Eustance Ranch to purchase. It is a more logical site for them than for FWP. Monger requested a “thumbs-up” to talk with these people to see if they would be interested in purchasing the land. Doherty stated that there is no harm in looking into it. “Thumbs-up” received.

**6. Brush Lake Acquisition – Informational. Doug Monger, FWP Parks Division Administrator,** said FWP sent a letter to the owner of the south part of Brush Lake with a final offer of \$60,000 for the 188 acres. The appraisal came in as purely agriculture land, and did not include any of the buildings or improvements. The landowner has been difficult to make contact with, and conversations through the grapevine indicate the chance of acquisition is slight, but nonetheless, the Department will continue to attempt to reach an agreement.

**7. Exotic Wildlife Classification for Importation / Possession – Final. Tim Feldner, FWP Enforcement Division, and Eileen Ryce, FWP Fisheries Division,** presented the final Exotic Wildlife Classification Rules for Commission approval, and discussed some changes. Feldner explained that the classification committee is made up of representatives of FWP, Department of Livestock, Department of Agriculture, Department of Public Health & Human Services, the pet trade, and the private sector. Exotic species are classified according to one of three categories, which are either controlled, uncontrolled, or prohibited.

Ryce stated that based on further review and on public comment, some changes are being requested in the tentative rules that were approved at the March meeting. She said the Legal Unit made a couple of clarification changes, and it was also discovered that venomous snakes had not been included in the tentative set of rules. The Department of Livestock also sent editorials to make the rule more consistent with the statutes.

Nine comments were received in opposition of classifying the short-tailed opossum as prohibited. The opossum has been removed from the rule for the present time, and will probably be classified as controlled rather than prohibited, following further evaluation by the Classification Review Committee.

Two comments were received in opposition of classifying African clawed frogs as prohibited, as it was felt that they could not survive in Montana. However, there are areas in Montana where the African clawed frog can survive by burrowing into mud or residing near thermal springs. It is felt that due to their predatory nature, and the possibility of disease and parasites, the African clawed frog should remain classified as prohibited. Ryce noted that schools often release the frogs when the school year is over.

Doherty suggested that FWP contact the Office of Public Instruction to request that they notify the schools not to dump critters or participate in bucket biology. Ryce said that has been discussed and information will be provided to the schools. They also plan to ask that the teachers seek another means to teach about tadpoles and frogs.

Mulligan asked where the rule states that a person cannot import exotic animals if they are not classified. Feldner said it is in the statute. Mulligan feels the actual statement that follows the legislation should be repeated in the rule. Feldner agreed that it would be a good idea to do that.

*Action: Mulligan moved and Brenden seconded the motion to approve the Exotic Wildlife Classification for Importation and Possession Rule as amended, and to also include a statement which repeats the statutory language stating that a person cannot import an exotic species that is not classified, and to proceed with the administrative rulemaking process. Motion carried.*

**8. Deep Creek FAS Acquisition – Endorsement.** Glenn Erickson, FWP Field Services Division Administrator, presented the Fisheries Division proposals. Erickson explained that this proposed access site is located along Highway 12, east of Townsend. The proposal is to acquire parking areas and a permanent easement to allow public fishing access along two miles of stream. There presently are no fishing access sites along this stretch of stream, which is a good trout fishing stream. The proposal is to purchase not more than 5 acres along with an access agreement for fishing. There has been no dollar figure arrived at as of yet. Mulligan recommended purchasing sufficient ground so people don't have to park along the highway.

*Action: Mulligan moved and Workman seconded the motion that the Department pursue the potential acquisition of a Deep Creek Fishing Access Site in Broadwater County east of Twonsend. Motion carried.*

**9. Machler Recreational Access & Conservation Easement on Big Spring Creek – Endorsement.** Glenn Erickson, FWP Field Services Division Administrator, presented the Fisheries Division proposals. This recreational access conservation easement is along Spring Creek between the Lazy KB Fishing Access Site and the Carroll Trail Fishing Access Site. Big Spring Creek is too small to float fish in, and too large for extensive wading, so fishermen have to walk above the high water mark to fish. This would be a walk-in site, therefore improvements would be limited to a small parking lot and minimal fencing. There is a great deal of public support for this proposal.

*Action: Colton moved and Mulligan seconded the motion that the Department pursue negotiations with Mr. Machler to acquire a conservation and recreational access easement on Big Spring Creek. Motion carried.*

**10. Harlowton FAS Proposal – Endorsement.** Glenn Erickson, FWP Field Services Division Administrator, presented the Fisheries Division proposals. This proposed fishing access site would be a cooperative project with the City of Harlowton within the boundaries of Chief Joseph Park, on the Musselshell River. The land is owned by the city, therefore there would be no cost to FWP for land purchase. FWP would design and construct the facilities, and the City of Harlowton would pay for the long-term maintenance. The city is in favor of the project, and in fact, approached the Department with the idea. Most land along the river is privately owned, which provides little public access.

*Action: Colton moved and Workman seconded the motion that the Department pursue negotiations with the City of Harlowton to develop an agreement providing for the development and long-term maintenance of a fishing access site within the City of Harlowton's Chief Joseph Park. Motion carried.*

**11. PPL Montana Public Access Mitigation–Lilienthal Property-Endorsement.** Glenn Erickson, FWP Field Services Division Administrator, presented the Fisheries Division proposals. Erickson said it is a complicated project. PPL Montana is required to develop four public access sites on the Missouri River to comply with the Federal Energy Regulatory Commission Project and the Missouri-Madison Comprehensive Recreation Management Plan. This 4-acre site has already been purchased by PPL, and they are currently developing the site. PPL proposes to sell it to FWP at a fair market value, and that money would go into a trust fund. The income from the trust fund would be used for recreation projects in the Madison-Missouri corridor. As PPL does not want to manage the site, they would contribute \$10,000 annually for operation and maintenance costs. The easement through the property allows access.

Nancy Johnson, PPL Montana Recreation Planner said she met with residents adjacent to this site, and they are in favor of PPL acquiring the property and developing it into a FAS, however they do want it to be walk-in and day use only.

*Action: Doherty moved and Colton seconded the motion that the Department pursue negotiations with PPL Montana, LLC, to accept the Lilienthal Property and to work out an agreement by which PPL Montana, LLC, would contribute \$10,000 annually for the operation and maintenance of the site (adjusted for inflation). Motion carried.*

**12. East Rosebud FAS – Endorsement.** **Glenn Erickson, FWP Field Services Division Administrator**, presented the Fisheries Division proposals. This site is located along Highway 78, south of Absaroka. The landowner proposes to sell a half-mile of stream frontage and a parking area. Depending on if FWP purchases both sides of the stream, the total acreage is between 20 and 45 acres. This proposal has not gone out for public comment yet. A price has not yet been negotiated, however the landowner has offered to share the cost of the appraisal. Colton said there is no access in that area, and he added that there are several luxury homes along that stream. Mulligan recommended purchasing sufficient land so people don't have to park on the road.

*Action: Colton moved and Mulligan seconded the motion that the Department pursue the potential acquisition of a Fishing Access Site on East Rosebud Creek in Stillwater County. Motion carried.*

**13. Commission Decision Whether to Reissue Non-resident Deer Combination Licenses Split from Big Game Combos – Final.** **Hank Worsch, FWP Licensing Bureau Chief**, explained that when non-residents buy big game licenses, they can choose to separate the deer license out and apply for an elk combination license only. This year there were 1,673 licenses separated in this manner.

The annual rule defines the process for reissuing these deer licenses among the general category, the landowner category, and the outfitter category. Most often, they go to the general category and the landowner category. Landowners must open their property to hunting to be eligible. This year there are 57 eligible landowners with the potential of 93 licenses available to them, and seven more landowners who reported late that may be eligible for 14 licenses. There are 1,566 licenses available in the general category, which is a pool of those who indicated on their applications that they are interested. The outfitter category is allocated no licenses because the target quota has been, or is nearly, reached. Issuance of these licenses does not conflict with the Deer Management Plan. The Department recommends offering these licenses.

*Action: Mulligan moved and Workman seconded the motion to reissue 107 separated deer licenses to non-residents in the landowner-sponsored category, and 1,566 separated deer licenses to non-residents in the general category. Motion carried.*

**14. Beaverhead/Big Hole Rivers Recreation Rules – Final.** (Complete information is included in the May commission files). **Doherty** welcomed the audience and assured them that the Commission has read the many written comments submitted on this issue. He added that in addition to written comments, public hearings have also provided a forum for the public to express their opinions, therefore testimony will only be accepted that is related to any **changes** to the proposed rules.

**Pat Flowers, FWP Region 3 Supervisor**, presented the proposed final administrative rule recommendations for the Beaverhead and Big Hole Rivers. He noted that amendments are being recommended to the proposed tentative rules.

Flowers began by briefly outlining the history of the river rulemaking process. The Commission adopted biennial rules in 1999 and 2001 to address social conflicts on the rivers in response to public outcry. They were then adopted in 2003 as Administrative Rules in accordance with the Montana Administrative Procedures Act. At that point, the Commission added language stating that the rules would be repealed or amended by May 1<sup>st</sup> of 2005 to allow time for the River Recreation Advisory Council to develop recommendations for statewide rules for addressing social issues. The Commission

adopted the statewide rules at the October 2004 Commission meeting, and in December of 2004, the Commission approved tentative rules for the Big Hole and Beaverhead Rivers based on recommendations of the Beaverhead Big Hole Citizen's Advisory Committee. An EA was subsequently developed with three alternatives included. The MEPA process was completed, and public hearings were conducted. In April of 2005, a one-month extension was granted to further summarize public comments, and to provide the Commissioners adequate time to review them. Public hearings were held in Bozeman, Butte, and Dillon, and the Department accepted written comments on both the proposed rules and the EA.

The public comment period (January 7, 2005 through March 7, 2005) generated many comments. FWP received 132 postcards asking the commission to adopt the existing rules with minimal modifications. FWP received 229 postcards that suggested the Commission reinstate the prohibition of float outfitting from Tash Bridge to Selway Bridge, as well as retain a Montana Resident's Day. Also received was a petition signed by 372 people that requested the Commission reinstate the prohibition of float outfitting from Tash Bridge to Selway Bridge, retain Montana Resident's Day, and keep the river rules in effect all year long.

Thirty-five comments were received regarding the proposed Environmental Assessment (February 15, 2005 through March 11). Thirteen people supported Alternative A, which would retain the existing rules without any changes. Five people supported Alternative B, which would allow float outfitting on the Beaverhead River from Tash Bridge to Selway Bridge, amend the reach restrictions on the Big Hole, and provide temporary client days to one-boat outfitters (the citizen advisory committee's recommendation). Sixteen people supported Alternative C, which would retain the restriction on float outfitting on the Tash to Selway section of the Beaverhead River, but would adopt all other elements of Alternative B. One person supported Alternative D, which would repeal all of the rules. Alternative C is the Department's preferred alternative.

Flowers presented the recommended changes to the proposed Administrative Rules.

(Note: Proposed Changes are in Italics)

1. New Rules I and III: Temporary Client Days

a. Action: Adopt the rules creating temporary client days with the following change:

- i. Wording change: *"In addition to temporary client days, a one boat outfitter may use non-pool client days that are transferred to that one boat outfitter as a part of the sale or transfer of an outfitter's business in its entirety. They must remain a one-boat outfitter, however, in order to apply for or retain the use of temporary client days. The transfer of those outfitting businesses that these rules regulate on the Beaverhead River (or Big Hole River) are governed by 37-47-310, MCA, as amended by the 2003 Legislature and approved by the governor effective March 24, 2003.*

Rationale: This change would clarify that a fishing outfitter must sell their business in its entirety in order to transfer river use days on a restricted use stream.

2. 12.11.202: River Definitions

- a. MCA change: For the definition of guide, change MCA 87-37-101 to MCA 37-47-101.  
Rationale: The code cited in the existing rules is incorrect.

- b. Wording change: Clarify that “one-boat outfitter” means an outfitter who operates no more than one boat and is the sole guide. *A "one-boat outfitter" could operate in that capacity on the Beaverhead River while operating as a multi-boat outfitter on the Big Hole and other rivers. Similarly, a "one-boat outfitter" could operate in that capacity on the Big Hole River while operating as a multi-boat outfitter on the Beaverhead and other rivers.*

Rationale: This language makes it clear that an outfitter could operate more than one boat on other rivers in the state, and that they could be a one boat outfitter on the Beaverhead and operate multiple boats on the Big Hole, and visa versa.

3. 12.11.205: Beaverhead River Recreational Use Restrictions

- a. Action: Retain the prohibition on float outfitting from Tash Bridge to Selway Bridge.  
Rationale: This restriction is consistent with the Beaverhead County Resource Use Plan’s objective to encourage the designation of a section of the Beaverhead River for the exclusive use and enjoyment of the unguided and unfitted public. The public comments indicate that the restriction is popular among many users of the river.

4. 12.11.215 and 12.11.220: New Outfitter Moratorium and Outfitter Restrictions on the Beaverhead and Big Hole river

- a. Wording change: “Outfitters authorized to outfit on the Beaverhead (or Big Hole) river who do not *report any use* for two consecutive years, effective upon the adoption of these rules, or outfitters authorized to outfit on the Beaverhead (or Big Hole) River who did not *report any use* for the five years prior to *December 31, 2004*, or outfitters authorized to outfit on the Beaverhead (or Big Hole) River whose license has lapsed, forfeit all of their client days and are no longer authorized to outfit on the Beaverhead (or Big Hole) River.”

Rationale: Previously the rules proposed that temporary client days would come from outfitters reporting zero use of client days, which would require the department to audit the outfitter client records. The proposed change would allow the department to determine zero use based on examination of the annual reports that show the overall number of client days served by a particular outfitter on a river. This is a much simpler task than auditing the client records. The wording change also allows that an outfitter whose license has lapsed would no longer be allowed to outfit on the Beaverhead or Big Hole rivers. This language was added to address the situation when an outfitter whose license has lapsed seeks to reestablish use of client days on the Beaverhead or Big Hole rivers. This practice would no longer be allowed and the “lapsed outfitter’s” client days would be added to the temporary client day pool.

Other Recommendations

- The department recommends that the commission retain the nonresident float restriction on Saturdays and Sundays on both rivers. After reviewing all of the available data and after considering all elements of the statewide river recreation rules, the department concluded that nonresidents are a primary contributor to a crowding problem on the Beaverhead and Big Hole rivers, and that the nonresident float restrictions are a reasonable method for addressing this concern with minimal impact on nonresident opportunities to recreate on these rivers.
- The department recommends that the commission adopt the modified temporary client day system but not make any other changes to the outfitter moratorium and client day allocation system. Based on the public comments, the department concluded there is no consensus within the outfitting industry on the fairest way to allocate use. Some outfitters are satisfied with the existing allocation system and others would like to see it changed.

Flowers said the Department deferred to the work of the CAC when making recommendations, with only a few exceptions.

Mulligan said it has been a long, challenging, effort-intensive process. There has been a lot of work by a lot of people, and a lot of frustrations over the last six years, and unfortunately there will not be a unanimous agreement no matter what. Some folks will be happy and some will not be happy. There has been overwhelming support to keep Tash to Selway closed – some folks will agree with this, while others won't. Changes to the upper Big Hole make perfect sense, and there was much support for launch restrictions and boat restrictions. He said it gets difficult when you get into non-resident floating restrictions. He added that he definitely would not support total closure to non-resident fishing. Mulligan has asked non-residents who purchase licenses at his store how they feel about the rules, and most have been supportive of them – they are bank fishermen and like the idea of not having floating on the river. He said he supports the outfitter moratorium, and the capping of client days, however the allocation of those days is a big challenge. Part of the reason it is a challenge is it is not something that the Department or the Commission can solve. The rule will work for now, but it certainly will not make everyone happy.

Mulligan said outfitters need to work together to develop a solution on the allocation of days dilemma. Mulligan invited the outfitters to work with the Board of Outfitters to take the lead and come back to the Commission with a proposal on a new allocation process, as long as the overall cap on outfitted use is not increased. Mulligan noted that this is not an invitation to propose revisions to other parts of the rule, such as the moratorium, caps, boat restrictions, or reach/day restrictions. The Commission cannot solve the outfitters' differences on how allocations should be made. If FWP takes the lead on this, it becomes the Department's problem, and it really needs to belong to the outfitters. He asked that the Department provide support in any way possible.

Mulligan also is concerned with the use of the days. There are difficulties in enforcing the intent of this rule. The original intent was not to allow the privatization or the commoditization of the days. There are people leasing days and trading days, and that was never the intent of this rule. The intent was for only those persons who are authorized to use those days, and their guides, to be able to use those days. Also, other outfitters could use those days when they are acting as guides for outfitters with authorized client days. He said the language needs to be clarified in this rule as to what is acceptable on the use of those days.

Brenden said he is bothered by the non-resident restrictions. He said non-resident fishermen impact the economy greatly, and he fears the Department is sending out a message that non-residents are not welcome. The motels, cafes, convenience stores, grocery stores, etc. need these people to survive. It also contributes greatly to FWP's budget. Although he believes Montana residents should be taken care of first, he does not want to project a negative message. He feels this is setting a precedent, which could cause legal problems. He said he doesn't like a lot of rules in regulations.

Flowers said that relative to legal concerns, the existing rules have already been challenged via a lawsuit brought by the Fishing Outfitters Association of Montana, but the non-resident component of the current rules was upheld by the District Court. Mulligan said it is not as simple as residents vs. non-residents, it is just as much floater vs. non-floater. Those non-residents who are fishing from the riverbanks are in favor of the restriction.

Colton said the discussion about economic impact by residents and non-residents is understated. He said his understanding is that the non-residents have learned to adapt to the rules, making their experience pleasant. He acknowledged that there is strong support by residents to limit the out of state sportsmen. He does not feel the rule is discriminatory. While non-resident permits may cost more, the residents who live in Montana pay taxes all year round, making it reasonable they pay a lesser fee. He also feels there is a great deal of "in-kind" trading going on that is not acceptable.

Doherty agreed that this issue has been complex. He feels that placing a cap on use days creates a very valuable use of days. It leads to commercialization and commoditization of those days. He remembered that as a legislator when this law was passed, the understanding was that when an outfitter sold his business, the days transferred with it. The borrowing or leasing of days is bothersome in that when the system was set up, folks did not *average* the numbers of days that were used, but instead, used the *highest number* of days that were used, so some outfitters received a lot of days. That means they have it locked up so other folks who want to get into the business cannot because the cost to buy those days is prohibitive. So now there is a public resource, and a public license, *not a property right*, that is suddenly very valuable. This is a situation that is akin to the value that the state has created in liquor licenses. The cap on the use of days hasn't been met, and people haven't been using their days, so the question now is how are these days allocated so that those who want to get into the fishing, guiding, and outfitting business can do that. He is satisfied with the restrictions on the river reaches, but he is not okay with the leasing, borrowing, renting, and selling of days for big dollars, which prevents other folks from getting into business.

Colton said he too is concerned about the leasing and trading of days. He has received calls informing him about lodges that are being built, and operations are going forward, and these people do not have use days, and yet they are planning on getting them somehow. These are large-scale operations. He agrees with Doherty that the rules are as good as they can be for access. He said he defers to the CAC for their opinions.

Workman asked how this can be re-addressed in a year or two if a situation presents itself? Flowers said changes would require the Commission to go through another rulemaking process. The rules also include a provision that they must be reviewed within five years. If something is not working, they can be addressed sooner.

Mulligan said from “day one” in this process, the Commission and the River Recreation Advisory Council made it totally clear in the language that client days were never intended to be a commodity. The one exception to that was that legislation allows a person to transfer their days with the sale of an entire business. He said comments have been received from some outfitters that if changes are made to their days, they will sue, which shows a lack of understanding of what the days are about. Client days are not owned by people, they are a privilege provided by the Commission, and they were never meant to be a commodity to increase the value of a business. That was one of the key issues important to the Commission when they first started with this process. From what is going on in the field outside of the intent of the rule, such as leasing and selling days, there obviously isn’t an understanding of what the intent of the rule is, and that understanding needs clarified. Mulligan said he has drafted language to clarify the intent of this rule, which he provided to the FWP Legal Unit for review, and would like to present it to the Commission for discussion.

Doherty suggested taking general public comments first on only the proposed changes to the rules, then discuss the proposed language on the leasing of client days drafted by Commissioner Mulligan, and then take comments on that specific language. He allowed comments from the audience.

Russ Kipp, outfitter, member of MOGA, and participant on the Citizen’s Advisory Committee, said the CAC did exactly what they were charged with. The rules should remain as recommended by the CAC, and he does not feel the Department is sticking to those rules with these amendments. User days should not be leased.

Joseph Annes, fly-fishing guide, expressed concerns regarding whether additional temporary pool use days will become available after two years by those outfitters who voluntarily give up their use, and he said this is a way around the moratorium as he is a guide, but he must wait two years to see that this plan does not work, and meanwhile others will sell their use, and that’s a crime. He asked if he can use multi-boats outside the two-month cap period, or is he a one-boat outfitter, and is he encouraged to hire guides to send to other rivers to build his viability while he solely guides on the Beaverhead and Big Hole Rivers. Mulligan said it would be a one-boat operation. Flowers said the recommended change would apply to the one-boat outfitter on the restricted river on which they are operating, and it would be year long. Sperry added that under the proposed rules, when a one-boat outfitter receives temporary client days, two-thirds of those days would be available during the 60-day window of time, and one-third of those days would be available during the shoulder season. That outfitter could not operate in the shoulder season at-will. He could also operate on other rivers. Mulligan said this is exactly why the outfitters need to work together. There may be a better way to allocate days. He said it will take initiative and accountability by the outfitters to work it out among themselves.

Alan Schallenberger, outfitter, memorialized Tom Harmon, who had a good outfitting business but lost it due to these rules. Schallenberger’s business has decreased as well. He said there is no crowding on the Big Hole River.

Bob DesJardins, Beaverhead County Resource Use Plan committee member, said the Plan was written with the intent of prohibition of outfitting being in effect year round. He does not feel the public was adequately represented in the CAC.

John Maki, outfitter, has a permit for 43 guest days on the Big Hole. He has not used the permit in recent years. He has a sale pending on his outfitting business that includes the Clarkfork and Big Hole rivers, which these days are a part of. He was gone during the comment period or he would have been there. He said permits were issued based on historic use and not on future use. He said he rested the resource by not using his permit.

Brenden asked Maki if he received a letter from FWP on this issue. Mike replied he had not. Flowers said notices and EAs were sent to 462 people and he (Maki) was not on the list. Colton asked Maki when he had last used his days, to which Maki replied some time in the 1990s. He said he recalls when he purchased his permit it could be passed on to his son, or could be sold with his business.

Doherty asked how many people are affected when outfitters have not used days, or reported use of days, for five years, and how many client use days does that mean. Mulligan said that FWP is totally dependent on the Board of Outfitters for that data, and has not had that data very long. Dependency on another entity is one of the challenges of the Department being in the business of splitting allocations.

Sperry said estimates are based on the Board of Outfitters records. On the Beaverhead River, the original number of outfitters authorized was 97, and under these proposed rule changes, where an outfitter's license has lapsed or an outfitter is now deceased, they would no longer be able to conduct use on the river. There are thirteen of those outfitters on the Beaverhead River with a total of 16 days allocated to them. Outfitters who have reported five years of zero use prior to December 31, 2004, are estimated at 21 on the Beaverhead River, which totals 38 client days. The Department estimates that, based on the proposed rule that says a one-boat outfitter could use two-thirds of their temporary client days during the 60-day window of time, there could be two one-boat outfitters on the Beaverhead. They would be applying for 105 temporary client days. So, the Department estimates there would be 65 outfitters, including the temporary client-day outfitters, for a total of 5,131 days allocated. This is the same as the original allocated use.

Sperry said there were 137 original outfitters Big Hole River. The lapsed outfitters or deceased outfitters total 15, resulting in 140 client days. The number of outfitters who have reported five years of zero-use is 33, for a total of 169 temporary client days. There are 309 available days in the pool, for 60 client-days per one-boat outfitter. There could be approximately six one-boat outfitters, which would bring the total number of authorized outfitters to 95 for 4,818 client days allocated.

Tony Schoonen, Skyline Sportsmen's Group and outfitter, said the intent of Representative Steve Gallus' bill was to sell an outfitting business in its entirety. Groups went to Rep. Gallus and asked that he be sure to make it clear that the client days are not property rights. Other states have stricter rules and regulations than Montana. He said he lost business before the rules – too many people and ethics problems. His group supports the FWP alternative rules.

Ray Gross, Friends of the Beaverhead, said they strongly support Resident's Day and Tash to Trash being closed to float outfitting. They support the rules being in effect year round. Montana residents have been pushed off the rivers due to overcrowding. Montanans spend a lot more money year round than non-residents do in the short time they are in Montana. Montanans vote here, and these issues are important to those who live here. The CAC was not represented as well as it could be. He complimented the Commission on their work on the rules.

Robin Cunningham, Fishing Outfitters Association of Montana, said he welcomes the opportunity for the outfitters to work together. He questioned what the definition of "lapse" is in these rules. Under Board of Outfitter law, December 31 is the cutoff date to renew a current license, but an outfitter also has until 90 days after December 31, with penalties, to apply and receive a license. Does the Commission consider it lapsed on January 1 or on April 1? He spoke on how the Board of Outfitters does their licensing, and wondered if there is a mechanism for the distribution of days. He welcomed the other Associations to work with him to develop a system for distribution.

Mary Ellen Schnur, Montana Outfitters and Guides Association, said resident and non-residents take up the same amount of space. She said we don't want to tell people to go away, they can still fish from the bank. She said she is glad to hear that concerns, and things that don't work, can be brought back for rule change proposals.

Larry Copenhaver, Montana Wildlife Federation, encouraged FWP to adopt the rules as recommended. Non-residents are welcome, but our first responsibility is to the residents of Montana. Most clients of outfitters are non-residents. He said most non-residents don't see it as a problem if they cannot float a two-mile stretch of river, they can still fish from the bank. They hope there are resolutions to the allocation situation.

Representative Debbie Barrett, Beaverhead County, said the agency has put the cart before the horse by setting policy by rulemaking. When recommendations of working groups are not used, and other plans are written in, this becomes an issue. She feels there are unintended consequences, and she sees the allocation has become exactly what many people in the state do not want it to be. She said economics have suffered. She has always questioned whether FWP has had authority to do what they did on these rivers. It is different than the Smith River, as that went through the legislative process. Governor Racicot appointed FWP to address the Beaverhead and Big Hole issue after it failed legislation. Barrett said if the Commission does nothing, she is concerned what will happen to the resource. The resource has never been at issue, it has always been recreation conflicts.

Mulligan said Representative Barrett is seeing what the Commission has been dealing with. It is a difficult process, and there is a distinct split in interests. Mulligan explained that this did pass the legislative session, but Governor Racicot vetoed it because he felt it had a number of unconstitutional issues. It was the feeling of the Commission at that time, as well as a number of outfitters and recreationists, that things were already a mess, so something needed to be done. The "mess" is not a recent development, it was created back when the legislation was proposed.

Mulligan presented his proposed wording for the rules:

*Outfitters not authorized on BH2 per these rules, when acting as a guide for another outfitter who is authorized on BH2 by these rules, must comply with 8.39.709ARM for guides. This would include the requirement that an outfitter acting as a guide must be solely working for the authorized outfitter for that time period, and must be the guide in the boat.*

*Leasing of days is prohibited. Client days must be used by outfitters authorized to operate on the BH2, or guides working solely for the authorized outfitter at the time the client days are used. Other than selling the business in its entirety, an outfitter may not sell the opportunity to use his/her allocated days on the river. Outfitters found to be leasing days on the BH2 to other outfitters or guides, or in violations of 8.39.709ARM on the BH2 shall forfeit those client days permanently. Forfeited client days will be allocated to the temporary client day pool.*

**Martha Williams, FWP Legal Counsel**, said she has concerns about some of the specific wording, but the concept is fine. Mulligan said he has no problem with approving this, should the Commission wish to approve it, with the caveat that Legal review it thoroughly and get back to the Commission. He said what he tried to do was reiterate the wording that is already in statute, and clarify what the intent of the rules was from the start.

Mulligan explained that 8.39.709ARM for guides may not be the only statute that is required, but that is the one that talks about an outfitter's authority to work as a guide. He explained that the intent of the words "solely working" means that that person could be an independent contractor or an employee. His intent is to clarify what the law is, and what the expectation and intent of this rule has been from the start, and to try to help focus on days not being used, and if they are being used illegally, they should be put back into the system for new outfitters. He does not want to see a system that causes destruction of outfitting businesses on these rivers through attrition. There needs to be opportunity for new businesses to be established. He does not like the idea that businesses are saleable for large amounts of money, but that is a legislative issue that has already been established.

Williams said the original rules do deal with transferability. She said FWP received public comment on the issue of leasing client days, therefore, technically this can be addressed in the final adoption as it is a clarification of transferability of client days, and was addressed in the comments.

Williams said she would add the first paragraph as a new subsection on both rivers. She questioned the requirement that an outfitter acting as a guide must be solely working for the authorized outfitter for that time period and must be the guide in the boat – does that mean the outfitter working as a guide for the outfitter who has the allocated use may not be conducting business somewhere else on that day? Can that outfitter acting as a guide have boats on another river somewhere else? Or does it mean that the outfitter acting as a guide must be in the boat on the Beaverhead and Big Hole Rivers and may not have other guides on other rivers? Mulligan said his intent was to reiterate the existing rule and he did not interpret that to mean that they could not have guides on other rivers.

Robin Cunningham, FOAM, said the outfitter who is licensed as an outfitter may act as a guide without requiring a guide license and that outfitter who is now a guide may only work for one outfitter at a time but he is still acting in the capacity as a guide. He may be an outfitter with other boats out, but in this capacity he is acting as a guide on that day in that situation, and can only go where that hiring outfitter has permission to go. He said that would comply with the Board of Outfitter's rules. Mulligan said that would meet his intent.

Sperry asked for clarification of the first sentence as to whether this language also pertains to outfitters who are authorized to conduct use on these two rivers. His understanding is that some of the outfitters who are authorized to conduct use on these two rivers sometimes serve as a guide for another outfitter. Mulligan said it should apply to both.

A great deal of discussion ensued regarding the existing wording, possible changes to the wording, and the intent of the wording. The words "not authorized on the Beaverhead and Big Hole Rivers per these rules" was removed, the word "sell" was replaced with "transfer", and the word "leasing" was replaced with "illegally transferring".

Workman said he is not comfortable about adding this wording to the rules in such a short time frame. Hager said this is a policy decision that the Commission needs to make. Colton said all the Commission is trying to do is **clarify** what is already there, not write an entire new rule. He feels the Commission should vote on the body of the rule with the idea of incorporating the tentative language. Since there are no substantive changes to the rule, it should not have to go through the rulemaking process.

*Action: Mulligan moved and Colton seconded the motion to insert this language into the rule as revised through discussion. Mulligan clarified that it have latitude for the Legal Unit to rework the wording and present it back to the commission after a week or two with any edits. The intent is to incorporate language that further defines the rules that we already have, not to create new rules.*

Doherty asked for public comment on the proposed language:

Joseph Aanes said he still does not see how this does not commoditize use. People can only sell their business in its entirety and it will sell higher because it has Beaverhead and Bighole use days. He feels leasing will still be done under the table.

Steve Luebeck, CAC and River Recreation Advisory Council member, supports the concept, however parts of the language give him cause for concern. There must be some uncertainty if there is the need to further clarify the language. He said people can sell businesses but not days. He advised the Commission to take some time and do it right, but urged taking final action on the rules today, as they are about to expire on June 1<sup>st</sup>.

Alan Schallenberger said to take some time to work on these so he doesn't have to sue FWP again.

Robin Cunningham said this needs to be clearly worded.

Scott Reynolds said he wonders if the language belongs in these rules. He said it sounds like it might belong in the statewide rules.

Tony Schoonen said to improve the language, then go ahead and adopt it.

Larry Copenhaver, MT Wildlife Federation, said another month would probably take care of most of the fears. There are a couple of words that need clarification.

Flowers said he would be concerned if no action is taken today. The rules would lapse after June 1<sup>st</sup>, which would open up the river. He encourages taking action. One option would be to state simple concepts that can be agreed on, then have the Legal staff flesh that out and incorporate the language via a conference call with the Commission. Another option is to charge the outfitting community with developing language as they have expressed willingness to work together.

Mulligan asked if this rule is approved as is, and this language is not finalized before June 1<sup>st</sup>, what happens then. Brenden said he is avidly against conference calls on such a weighty item. Colton said action needs to be taken. He said this is only clarification of the rules. He said what Mulligan is attempting to do, and he (Colton) is supporting, is simply saying this rule means "you can't fiddle with the days trying to cheat the system". He said this is just an attempt to take the existing rules and make it clear to outfitters who may want to engage in commoditizing their days that it is not acceptable. He said all of the Commissioners have been contacted by people who are saying this is happening, and they are concerned because it is illegal.

Workman asked if the present rules could just be extended for another month while this language is being reviewed. Mulligan said he would rescind his motion on the language proposal before he would agree to extend the entire rules for another month. There is no reason to delay the decision on the rest of the rules. Colton said it is a disservice if it is held up and then ends up with this language in a rulemaking process.

*Action: Mulligan rescinded his motion. Colton withdrew his second to the motion.*

*Action: Mulligan moved and Colton seconded the motion to approve the Beaverhead and Big Hole Rivers Administrative Rules as proposed in the Department's preferred Alternative C, incorporating the changes recommended by the Department at today's meeting. Motion carried. Four in favor – one opposed (Brenden).*

*Action: Mulligan moved and Workman seconded the motion to direct the Department to prepare the language for incorporation into this rule to implement the intent of prohibiting commoditization, leasing, and other violations, to clarify the language on the violations of how the days may be transferred, and to incorporate this language into the rule as a whole, and if not, to advise how to proceed with rulemaking. Motion carried. Four in favor – one opposed (Brenden).*

The definition of “lapse” in the rule was once again questioned. Sperry said this came up prior to the last round of rulemaking. The Board of Outfitters asked FWP for an interpretation of the existing rules and whether or not in the situation where an outfitter's license has lapsed, and they reapply, would they then be reauthorized to conduct use on the Beaverhead or Big Hole Rivers. This situation actually happened, and following FWP legal review, the subsequent conclusion of no was reached. The response by FWP legal staff was submitted to the executive Director of the Board of Outfitters. It reads “the decision has been made concerning the qualifications of “Outfitter A” to be able to benefit from his historic use of the Beaverhead and Big Hole Rivers after he let his outfitting license lapse. The decision is to disqualify him. Administrative Rule 12.11.215 Subsection 1, and 12.11.220 Subsection 1 state that the outfitter may continue to operate accordingly. An outfitter like “Outfitter A” cannot qualify with his historic use when he let his license lapse since he has not been operating continuously. Sperry said the legal staff concluded after reviewing existing rules that in the situation where the license has lapsed, they are no longer authorized to conduct use on the Beaverhead and Big Hole Rivers and cannot once again become authorized. So what the Department is proposing is language to make that clearer, and to re-emphasize what the legal staff has already concluded. Sperry said the Department's definition of “lapse” will be consistent with the Board of Outfitters' determination of “lapse”.

**15. Upland Game Bird Seasons - Tentative.** Jeff Herbert, FWP Wildlife Division Assistant Administrator, and Gary Hammond, FWP Wildlife Division Management Bureau Chief, presented the Wildlife Division proposals.

## **FALL TURKEY**

### **Region 1**

No proposed changes to the 2004 season regulations

*Action: Workman moved and Colton seconded the motion to approve the Region 1 Turkey Seasons as recommended by the Department. Motion carried.*

Region 2

One proposed change to the 2004 season regulations – HD285-50

*Action: Workman moved and Mulligan seconded the motion to approve the Region 2 Turkey Seasons as recommended by the Department. Motion carried.*

Region 3

No proposed changes to the 2004 season regulations

*Action: Mulligan moved and Workman seconded the motion to approve the Region 3 Turkey Seasons as recommended by the Department. Motion carried.*

Region 4

No proposed changes to the 2004 season regulations

*Action: Doherty moved and Workman seconded the motion to approve the Region 4 Turkey Seasons as recommended by the Department. Motion carried.*

Regions 5, 6, and 7

No proposed changes to the 2004 season regulations

*Action: Mulligan moved and Brenden seconded the motion to approve the Region 5, 6, and 7 Turkey Seasons as recommended by the Department. Motion carried.*

**SAGE GROUSE**

Hammond explained that 65 leks were sampled across the state. The Management Plan states that if the count of males is 27.1 or more, there will be a 4-bird bag limit. After sampling, the recommendation is for a 2-bird bag limit. The season runs from September 1 – November 1.

Doherty questioned why Sage Grouse are still being hunted if the possibility exists that they may be listed on the threatened and endangered list. Herbert said the pressure to list the bird comes from other areas as they have declined significantly in other states, however, Wyoming and Montana still have good populations. Montana wants to maintain what is here, and the thrust of the management strategy is to do just that.

Doherty said harvest is down; lek numbers are trending down; it appears there are few birds. He asked if FWP is setting bag limits to avoid the pressure of listing. Herbert said hunters today are more interested in hunting pheasants, and the decline in Sage Grouse harvest is more a reflection of that interest than it is a major decline in Sage Grouse numbers.

Doherty asked what is happening to the habitat. Herbert said in some areas there is degradation, but in other areas the conditions are fairly stable. Responsible grazing management has been helpful to Sage Grouse habitat. Herbert said the variation in annual production is greatly tied to weather patterns.

Mulligan said the worst thing FWP can do is change the opening day. Hunting is not a significant issue on the population. There is no basis for listing in Montana.

*Action: Brenden moved and Mulligan seconded the motion to approve the Sage Grouse regulations as recommended by the Department (2 bird bag limit). Motion carried.*

**RING-NECKED PHEASANTS, MOUNTAIN GROUSE, SHARP-TAILED GROUSE, PARTRIDGE**

No proposed changes to the Ring-necked Pheasant, Mountain Grouse, Sharp-tailed Grouse, or Partridge regulations.

*Action: Mulligan moved and Brenden seconded the motion to approve the Ring-necked Pheasant, Mountain Grouse, Sharp-tailed Grouse, and Partridge regulations as recommended by the Department. Motion carried.*

**FALCONS**

No proposed changes to the regulations

*Action: Colton moved and Workman seconded the motion to approve the Falcon regulations as recommended by the Department. Motion carried.*

**16. HB454 Hunting Access Agreements – Tentative. Gary Hammond, FWP Wildlife Division Management Bureau Chief,** explained that in 2001 the legislature passed House Bill 454 (87-2-513 MCA) authorizing FWP to issue either-sex or antlerless permits to landowners for management purposes as long as they agree to offer free public elk hunting and meet additional established criteria. In return, the landowner will receive a permit. John Swanz submitted the only application.

*Action: Colton moved and Brenden seconded the motion to approve the John Swanz hunting access agreement for the 2005 general season. Motion carried.*

**17. 2005 Deer, Elk, and Antelope Quotas – Tentative. Gary Hammond, FWP Wildlife Division Management Bureau Chief,** said the mild, open winter, and recent precipitation are positive for the populations. Proposed changes in Region 6 are relative to the adaptive harvest management plan, and reflect a reduction in recruitment in the region.

**DEER**

**Regions 1, 3, and 5**

No proposed changes to the existing quotas

*Action: Mulligan moved and Workman seconded the motion to approve the Region 1, 3, and 5 Deer quotas as recommended by the Department. Motion carried.*

**Region 2**

Seven proposed changes to the existing quotas – HDs 200-00, 201-00, 202-00, 261-50, 270-50, 285-00, 291-50)

*Action: Workman moved and Colton seconded the motion to approve the Region 2 Deer quotas as recommended by the Department. Motion carried.*

**Region 4**

Six proposed changes to the existing quotas – (HDs 400-00, 404-00, 413-00, 416-00, 447-00, 471-00)

*Action: Colton moved and Workman seconded the motion to approve the Region 4 Deer quotas as recommended by the Department. Motion carried.*

Region 6

Five proposed changes to the existing quotas – (HDs 620-00, 650-00, 652-00, 652-50, 690-00)

*Action: Brenden moved and Workman seconded the motion to approve the Region 6 Deer quotas as recommended by the Department. Motion carried.*

Region 7

Two proposed changes to the existing quotas – (HDs 007-14, 797-00)

Colton said this action is called for under the management plan, and there is logic behind it. This action affects the second license.

*Action: Colton moved and Brenden seconded the motion to approve the Region 7 Deer quotas as recommended by the Department. Motion carried.*

**ELK**

Region 1

No proposed changes to the existing quotas

*Action: Workman moved and Colton seconded the motion to approve the Region 1 Elk quotas as recommended by the Department. Motion carried.*

Region 2

Three proposed changes to the existing quotas – (HDs 201-00, 283-01, 285-71)

*Action: Workman moved and Mulligan seconded the motion to approve the Region 2 Elk quotas as recommended by the Department. Motion carried.*

Region 3

One proposed change to the existing quotas – (HD339-20)

*Action: Mulligan moved and Brenden seconded the motion to approve the Region 3 Elk quotas as recommended by the Department. Motion carried.*

Region 4

Sixteen proposed changes to the existing quotas – (HDs 411-00, 411-01, 411-20, 412-00, 412-20, 416-00, 417-00, 417-20, 426-00, 426-20, 446-00, 446-01, 448-00, 449-00, 452-00, 454-00)

*Action: Doherty moved and Colton seconded the motion to approve the Region 4 Elk quotas as recommended by the Department. Motion carried.*

Region 5

One proposed change to the existing quotas – (HD590-20)

*Action: Colton moved and Mulligan seconded the motion to approve the Region 5 Elk quotas as recommended by the Department. Motion carried.*

Region 6

One proposed change to the existing quotas – (HD620-20)

*Action: Brenden moved and Colton seconded the motion to approve the Region 6 Elk quotas as recommended by the Department. Motion carried.*

Additional change to Region 6

Two additional proposed changes to the existing quotas – (HDs 631-20, 631-00)

Decrease HD631-00 antlerless licenses from 170 to 70

Decrease HD631-20 either-sex licenses from 30 to 15

*Action: Brenden moved and Colton seconded the motion to approve the Region 6 Elk Quotas as recommended by the Department. Motion carried.*

Region 7

Two proposed changes to the existing quotas – (HD799-00, 799-20)

*Action: Colton moved and Brenden seconded the motion to approve the Region 7 Elk quotas as recommended by the Department. Motion carried.*

**ANTELOPE**

Regions 2, 3, 4, 5, 6, 7

One proposed change to Region 6 – (HD690-30). No other changes proposed.

*Action: Brenden moved and Mulligan seconded the motion to approve the Region 2, 3, 4, 5, 6, and 7 Antelope quotas as recommended by the Department. Motion carried.*

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Workman stated that he wanted to increase the bison quota.

*Action: Workman moved that the Department redo the EA for bison to increase the quota from 25 to at least 50 or maybe 100. No second to the motion.*

Colton stated this is inappropriate and may be illegal when there is a specific number involved. Doherty asked what the procedure was to increase the quota over 25. Workman said the EA would have to be re-done. He asked how the quota of 25, and not 100, was determined in the current EA.

**Pat Flowers, FWP Region 3 Supervisor**, said the Department went through a lengthy process. First, the idea of hunting bison was drafted into a scoping proposal that was put out for public comment. Comments were received, which ranged from no hunting to some hunting to extensive hunting. Then, FWP created an array of alternatives. The most aggressive alternative was the nine time periods over a three-month season, which equaled 225 permits. An EA was drafted and presented for public comment. Based on those comments, it was agreed that 25 permits over a three-month season was appropriate. FWP staff and the EA decision makers also felt that it was appropriate to start small to establish a successful hunt to build on. Flowers suggested looking at changes for next season, but leave this season as proposed. This increase in the quota is a new alternative in his opinion

**Martha Williams, FWP Legal Counsel**, said the 4<sup>th</sup> alternative in the EA covered increasing the quota of bison to 225, however it was over incremental time periods. Doherty asked if the Commission can approve any number up to 225 without going out with another EA. Hagener said it has to be included in one of the analyzed alternatives – you cannot arbitrarily select an amount of permits (i.e. 75 permits over 3 months) if it is not one of the alternatives. Williams said she thinks alternatives can be combined as long as the impacts of those alternatives are the same.

Flowers said it concerns him to issue 50 permits over a 3-month season, as that would have all of the hunters out the same day. That has a much different implication than 25 permits over 9 periods of 10 days.

Colton said if a decision is made outside the EA, the decision would be challenged. Williams said impacts must be analyzed when a decision is made that is not one of the alternatives. Impacts would be different if the quota is over 25. Flowers said the EA and the decision notice provide the bounds for the Commission's decisions. If the Commission goes over those bounds, it is a violation of MEPA regulations and will be challenged.

Hagener said at the very least, Dr. Tom Linfield, Marc Bridges, and Director Hagener would have to rewrite a new decision notice. If Department of Livestock disagrees, it cannot be done. It takes consensus of all agencies involved. **Kurt Alt, FWP Region 3 Wildlife Manager**, said the conservative number was selected to conform with the Interagency Management Plan.

Doherty said decision makers have to show that they have studied the impacts, and they have to take into account the comments received. It must be established on the record that the impacts have been considered on the different alternatives. Mulligan said his interpretation is that the impact of more than 25 permits all at the same time was not considered. **Don Childress, FWP Wildlife Division Administrator**, said all entities must be included.

Flowers said the best way to answer the question properly is to allow staff to take time to deliberate, share information, explore options and opinions, confer with DOL, then get back to the Commission. That was agreed upon.

*Action on Motion: Workman withdrew his motion.*

**18. Public Opportunity to Address Issues Not Discussed at this Meeting.** No comments.

*Action: Workman moved and Colton seconded the motion to adjourn. Motion carried.*

Meeting adjourned at 2:26 p.m.

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**Steve Doherty, Chairman**

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**M. Jeff Hagener, Director**